United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

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Date: July 24, 1997

Case No. 95 INA 339

In the Matter of:

CATHY D. ANGELL,
Employer

on behalf of

SHARMIE KHAN NABBIE,
Alien

Appearance: B. K. Lipton, Esq., of Perth Amboy, New Jersey

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Sharmie Khan Nabbie (Alien) by Cathy D. Angell (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application the Employer and the Alien requested review under to 20 CFR § 656.26.

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and avail-able at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the

requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On April 3, 1992, the Employer applied for labor certification to permit her to employ the Alien as a "Domestic Live-in" with duties that included child care, cooking, cleaning, laundry, making beds, ironing and vacuuming. The application did not list any educational requirements, but required three months of experience in the Job Offered or in the Related Occupation of Daycare Assistant. The other Special Requirements were that the worker must reside on premises, that references were required, and that the worker be a non-smoker. The job required forty-four hours a week at a basic salary of $275 per week and $8.97 for overtime.[1]

In her statement of qualifications, the Alien indicated that she had been employed by the Employer as a housekeeper and had performed the duties of the job for a period of six months before the date of the application. The only other experience she noted was as a Daycare assistant at E.T.'s Daycare for a period of six months with duties that included child care, cooking, housekeeping, and using the oven and operating the vacuum cleaner. Another exhibit submitted in connection with the application was a statement from E.T.'s Daycare which notes that the Alien's duties while employed there included assisting in Pre-school and Pre-school activities, caring for children, cooking and light housekeeping.

Notice of Findings. The CO's Notice of Findings (NOF) stated that certification would be denied subject to rebuttal. One of the reasons for denial was that certification for the "Schedule B" occupation in this case requires documentation of at least one full year of paid experience in the tasks to be performed and that the Employer had failed to document that the Alien had such experience. The CO then said, "Although we note alien is currently working for employer and has been since August 12, 1991, the alien did not have the one year experience with the employer at the time the application was filed. You may either submit evidence of one year of paid experience prior to filing date of April 3, 1992, or, if such experience is not available,

[1]This was clarified at AF 20, which indicated that the first forty hours were to be paid at $5.98, and the next four hours were to be paid at $8.97, which was calculated to be time and a half. Essentially, this was a forty hour a week job with required overtime to the extent of four hours each week.

employer may document alien's one year experience in her household. In the latter situation, the filing date would be canceled and a new application may be submitted after six months from date of denial."

Rebuttal. In response to the NOF, the Employer submitted a statement from the Alien in which she said she had worked five days a week at a day care center in Trinidad from January 1986 to December 1986. Her pay was $600.00 per month and her duties included taking care of children, cleaning, cooking, doing light laundry and shopping. She said that she was unable to locate her former employer to procure corroborating evidence. The Alien's sister declared in an accompanying statement, that she worked with the Alien at the day care center and that both of them had worked as teachers. She said that the Alien's duties at the day care center in Trinidad included working with children, preparing light meals and snacks, doing laundry and cleaning.

Final Determination. On December 1, 1994, the CO found in the Final Determination that the Alien's child care center work was not experience that was equivalent to the duties performed by a houseworker. Certification was denied on grounds that the Employer failed to document that the Alien had the one year of paid experience required by 20 CFR §656.11.

Appeal. The Appellate File has been referred to the Board for the review of the findings and order of the CO.[2]

DISCUSSION

20 CFR § 656.11(a) provides that, in the absence of a waiver obtained under 20 CFR § 656.23, the positions listed Schedule B occupations cannot be certified because there are U. S. workers who are able, willing, qualified and available for these occupations. The position in this case falls within the definition of a Household Domestic Service Worker, which is included in Schedule B, and which is defined as follows in 20 CFR § 656.11(b)(26):

> Household Domestic Service Workers perform a variety of tasks in private households, such as cleaning, dusting, washing, ironing, making beds, maintaining clothes, marketing, cooking, serving food, and caring for children or disabled persons. This definition, however, applies only to workers who have less than one year of documented full-time paid experience in the tasks to be performed, working on a live-in or live-out basis in private

[2]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

> households or in public or private institutions or establishments where the worker has performed tasks equivalent to tasks normally associated with the maintenance of a private household...

If the job offer involves a live-in household domestic worker, the employer must present documentation of the alien's paid experience in the form of statements from past or present employers which shall include a detailed statement of the duties performed on the job and the equipment and appliances used, as required by 20 CFR § 656.20(a)(3)(iii). As the Employer did not apply for a waiver, this application will be denied unless the Employer produces documentation that the position is exempt from classification under Schedule B on grounds that the Alien has the requisite experience.

Citing, **Schuster & Border,** 90-INA-503(Mar. 31, 1992), the Employer contends that the Alien's experience in a private or public institution qualifies as experience under 20 CFR § 656.11 (b)(26), where the tasks performed are those associated with the maintenance of a private household. The Employer notes that the Dictionary of Occupational Titles (DOT) definition of a House Worker, General, includes a number of the same duties as the DOT definition for a nursery school attendant, such as overseeing children, preparing food and cleaning quarters. Based on inferences drawn from these facts, the Employer argues that the Alien's experience of more than one year of working in nursery schools exempts her from the provisions of Schedule B.

Even assuming that the Alien's employment prior to working for the Employer did include a significant number of the duties involved in the Employer's job offer to qualify as experience as a household domestic worker, the problem of proof in this case is that any such past experience has not been credibly documented.[3] Merely stating that past experience has included cooking and cleaning does not satisfy the requirement for documentation of qualifications for the position under the regulations, which require "detailed" statements of the duties performed and of the equipment used. Moreover, we are not aware of any exception to the rule that documentation of this type must come from an employer, not from a co-worker, as in this case. For these reasons it must be found that the Employer did not establish that the Alien has the necessary experience to qualify her for the waiver under 20 CFR § 656.23 that is required by the application of 20 CFR § 656.11(a) to the Appellate File in this case.

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[3]The Board has held consistently that an alien cannot use experience gained while working for the employer as qualifying experience under 20 CFR §656.11. See **Roger and Denny Phelps**, 88-INA-214 (May 31, 1989) (en banc)

As we conclude that the Employer's application for certification was properly denied by the CO, the following order will enter.

ORDER

The Certifying Officer's denial of certification is Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO. 95-INA-339

CATHY D. ANGELL, Employer
SHARMIE KHAN NABBIE, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

June 6, 1997